



**DEPARTMENT OF THE ARMY**  
**HEADQUARTERS UNITED STATES ARMY FORCES COMMAND**  
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REPLY TO  
ATTENTION OF

AFLG-PRO

6 Aug 98

MEMORANDUM FOR SEE DISTRIBUTION

SUBJECT: Contracting Information Letter (CIL) 98-36, Review of  
Primary Protest Issues in 1997

1. Enclosed is an analysis of types of protests to the  
Comptroller General in 1997. The breakdown shows an overwhelming  
number of protests in the area of standard negotiated  
procurements.

2. For additional information, please contact Irene E. Hamm,  
[hammi@forscom.army.mil](mailto:hammi@forscom.army.mil) or 404/464-5632.

Encl

A handwritten signature in black ink, reading "Charles J. Guta", is positioned above the typed name.

CHARLES J. GUTA  
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## Disputes & Litigation

Over the last five years, the number of protests to the Comptroller General continued to decline.

Total for each year:

1993	850
1994	662
1995	583
1996	537
1997	410

These numbers are encouraging because protests not only disrupt the procurement process but also waste the participant's resources. A review of Comptroller General decisions for 1997 provides the following data:

Negotiated procurement actions protested included:

Standard negotiated procurements	277
Sealed bidding procurements	68
Simplified acquisitions	17
Federal Supply Schedules (FSS)	9
SBA ~ 8(a) procurements	8
Nonprocurement matters	6
Broad Agency Announcements (BAA)	1
A-76 contracting-out issues	1
Reprocurement after default	1

Not included in the above statistics were approximately 29 cases that the resolutions were procedural, not substantive (e.g., denials of reconsideration or denials of jurisdiction).

Of the protests dealing with procurement actions other than standard negotiated procedures and sealed bidding, only four (three of which involved Small Business Administration 8(a) procurements) were granted. Only one of the protests in the 29 decisions concerning simplified acquisitions, FSS, BAA, A-76 procurements, and reprocurements after default terminations were sustained. The Comptroller sustained three of the eight decisions concerning SBA 8(a) procurements. In one case, the Comptroller sustained a protest by an incumbent 8(a) contractor, holding that the agency did not provide accurate information to the SBA when it recommended another contractor for the follow-on work. The recommendation included work done by the incumbent contractor. The Comptroller sustained a protest when the agency did not inform the SBA that the protesting company expressed an interest in the work under the contract. In both cases, the SBA

apparently supported the protester yet the agency inexplicably carried the protest through to decision. A Comptroller sustained protest filed by a contractor involved a contractor that was not considered for an 8(a) contract after it told the agency about its commercial software. The agency recommended award to another contractor whose price was about triple that offered by the protester. The Comptroller ruled that the award was improper because the price exceeded the fair market value of the work.

There were 68 protests involving sealed bidding procedures and concerned the following matters:

Responsiveness	24
Cancellation of procurement	5
Unbalanced bids	6
Late bids	5
Bid evaluation	5
Mistakes in bids	4
Responsibility	4
Terms of the IFB	4
Other	11

Although most of these protests appeared to be routine, 16 were sustained. Five of the 16 sustained protests involved responsiveness issues where it appeared the agency was given bad legal advice (e.g., protester's failure to acknowledge an amendment relaxing a performance requirement deemed a minor informality, bid on less than all items when IFB did not call for aggregate award, and failure to sign certification when signed bid contained same performance requirement).

Three of the sustained protests concerned bid evaluation (e.g., mathematical mistake in calculation of total bid price, miscalculation of agency cost in overseeing performance, no support for determination that low bid was at a reasonable price. The Comptroller ruled that the requirement had not been met when the KO found that the awardees' prices for paint were more than double those paid on the prior contract and the KO's only justification for accepting the higher prices was that the cost of the ingredients had risen by 13.5 percent.

The 277 protests on negotiated procurements dealt with the following:

Evaluation of proposals	128
Past performance	43
Meaningful discussion	23
Terms of the RFP	20
Protest costs	15

Cost realism	12
Rejection of proposal	12
Competitive range	11
Scope of contract	9
Award without discussions	8
Untimely protest	8

Because many of the protests dealt with more than one issue, this list is not indicative of the cumulative number of protests. However, the list captures major procurement issues handled by the protest process in 1997.

Evaluation of proposals was the dominant issue in protests of competitive negotiation procedures decided in 1997. Of the 128 protests in this category, only 11 were sustained. It appears that the difficulty of winning a protest on this issue is due to the significant discretion given to procuring agencies in the evaluation process.

To demonstrate that an evaluation has been performed improperly, the protester must present clear evidence that something arbitrary or irrational occurred or that the agency did not follow the evaluation scheme described in the RFP.

A key issue in all 11 winning protests was the adequacy of the agency's documentation. When the protester submits arguments that require the Comptroller to look at the details of an evaluation, the agency is in a weak position if its documentation does not support the conclusions reached by the agency. In the numerous protests denied by the Comptroller concerning evaluations, agencies were able to document their evaluators judgements and the Comptroller honored those judgements.

The use of past performance in the competitive negotiation process was the second most frequently protested issue. However, of the 43 protests concerning this issue, only four were sustained. One for improper evaluation of past performance and the other three involved instances where the agency failed to follow the FAR requirement that an offeror be advised of adverse past performance information on which it has not previously had an opportunity to comment. The high percentage of protests that are denied in this area appears to indicate that the Comptroller is willing to allow agencies a large amount of discretion in evaluating past performance and that agencies are learning how to handle this important evaluation factor.

In contrast to the above areas, the agencies fared poorly when the protests concerned meaningful discussions. Nine out of 23

protests were sustained. In addition to the three cases where the agency failed to advise the offeror of adverse past performance information, the agencies lost six other protests.

In negotiated procurements, contracting agencies must conduct discussions with all offerors whose proposals are within the competitive range. Although discussions need not be all-encompassing, they must be meaningful; that is, an agency is required to point out weaknesses or deficiencies in a proposal as specifically as practical considerations permit so that the agency leads the offer into areas of its proposal which require amplification or correction. Discussions cannot be meaningful if an offeror is not advised of the weaknesses, excesses, or deficiencies in its proposal that must be addressed in order for the offer to be reasonably in line for award.

The recent FAR Part 15 rewrite includes spelling out the rule requiring meaningful discussions and should reduce the number of agency losses in this area. The only other area where agencies lost a high percentage of protests -- four out of nine--involved challenges to procurements as being outside the scope of the original contract. The losing protests were all under broad contracts where agencies were trying to stretch the scope of the basic contract to cover new work.

The number of protests is clearly declining, with the result that the number of winning protests is also declining. It continues to be difficult to win protest. In most of the protests, it appears that a good settlement conference would have resolved the matter without the need for a decision.